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JURISDICTIONAL STATEMENT

Because death was imposed, this Court has exclusive jurisdiction of this Rule 29.15 appeal. Art. V, Sec. 3, Mo. Const.

INTRODUCTION

From the time Mr. Smith first arrived at the Potosi Correctional Center, and throughout this cause, there have been incidents that create substantial questions about Mr. Smith's mental health and his competency to waive his appeals. See chart at p.7. Those problems were identified by Mr. Smith's treatment care providers who work for the State of Missouri. Immediately after Mr. Smith arrived at the Potosi Correctional Center, he made a serious suicide attempt that resulted in head injuries requiring treatment outside Potosi. Since coming to Potosi, Mr. Smith has experienced hallucinations and delusions. For the first time ever, Mr. Smith was diagnosed at Potosi as suffering from bipolar disorder with psychotic features.

At the time Mr. Smith prepared his first filing to dismiss, his Potosi treating psychiatrist, Dr. Jones, noted that he had not been receiving the proper dosage of his anti-psychotic medication, Risperdal. During the course of Dr. Jones' care, Mr. Smith told Dr. Jones that he was concerned that his inability to concentrate could adversely impact his ability to participate in his case. That concern is directly at odds with what Mr. Smith has told the 29.15 court.

Shortly before the motion court heard evidence, Mr. Smith wrote two letters to Dr. Jones. The first requested Dr. Jones increase his anti-psychotic medication because he was "really feeling agitated" and his case and family problems had him "pretty uptight." The second letter informed Dr. Jones that Mr.

Smith was “feeling anxiety and depression” and asked for an additional increase in his anti-psychotic medication.

Mr. Smith told the motion court that the reason “why” he wanted to dismiss his 29.15 case was because his trial attorneys had not been “straight up” with him. The facially irrational nature of this explanation illustrates further the need for an evaluation to determine Mr. Smith’s competence to waive his 29.15 rights. These events, and others, all of which occurred since Mr. Smith was convicted and sent to Potosi, constitute new evidence which create substantial questions about Mr. Smith’s competence to forgo his 29.15 rights. Confronted with this evidence, the motion court should have ordered that a mental evaluation of Mr. Smith be conducted to determine his competency to waive his 29.15 rights. This Court should now order that such an evaluation be performed.

New Evidence To Question Competency	
Date	Event
July 29, 1999	Dr. Selbert's initial evaluation findings – unstable, agitated, irrational.
August 1, 1999	Suicide attempt – found unresponsive.
August 5, 1999	Hallucinations & delusions – Dr. Reddy's psychotic disorder diagnosis.
October 21, 1999	Dr. Selbert's evaluation findings of “bizarre and confused thinking and conduct” and threat to self on “unpredictable occasions.”
January 27, 2000	Dr. Reddy's first ever diagnosis of bipolar disorder with psychotic features.
June 27, 2001	Date of letter to Judge Hodge requesting dismissal.
July 12, 2001	Dr. Jones notes – not receiving proper dosage of antipsychotic Risperdal and displaying increased anxiety, agitation, and difficulty concentrating.
	Refuses to meet with 29.15 counsel – appears agitated and anxious.
October 2, 2001	Dr. Jones finds – irritable, aggressive, and unable to control temper.
	Mr. Smith tells Dr. Jones he is concerned that his inability to concentrate will adversely impact his ability to participate in his case.
October 5, 2001	Dr. Jones' request for non-formulary drug because of Dr. Jones' concerns about Mr. Smith's ability to concentrate and participate in his case.
April 25, 2002	Mr. Smith writes to Dr. Jones asking his anti-psychotic medication be increased because he was “really feeling agitated” and his case and family problems had him “pretty uptight.”
May 17, 2002	Mr. Smith's complaints of anxiety and depression noted.
Sometime after June 6, 2002	Mr. Smith again writes Dr. Jones stating he was “feeling anxiety and depression” and asking for further anti-psychotic medication increase.
July 31, 2002	Motion court's hearing on request for evaluation. Mr. Smith tells motion court he wants his case dismissed because his trial attorneys were not “straight up” with him.

STATEMENT OF FACTS

A. CRIMINAL CAUSE

Mr. Smith was convicted of two counts of first degree murder and sentenced to death on both counts. State v. Smith, 32 S.W.3d 532, 539 (Mo. banc 2000). He was also convicted of two counts of armed criminal action and sentenced to consecutive twenty year terms. Smith, 32 S.W.3d at 539.

At trial, respondent presented evidence that Brandie Kearnes ended her dating relationship with Mr. Smith. Smith, 32 S.W.3d at 539. Mr. Smith drove to the residence where Ms. Kearnes lived with her mother, Yvonne Kurz, and her stepfather, Wayne Hoewing. Smith, 32 S.W.3d at 539-40. Mr. Smith scuffled with Ms. Kearnes and Mr. Hoewing, both of whom died from stab wounds. Smith, 32 S.W.3d at 539-40.

Judge Normile, on his own motion, ordered a psychiatric examination of Mr. Smith under Chapter 552 (T.L.F. 11). That order was withdrawn on the defense's motion (T.L.F. 11, 22). On the respondent's motion, the case was transferred to Judge Hodge, who presided at trial (T.L.F. 23).

Mr. Smith wrote to Judge Hodge asking to plead guilty and be sentenced to death (T.L.F. 90). Respondent filed a motion to accept Mr. Smith's offer (T.L.F. 224-25). Respondent also filed a motion for a "second" psychiatric examination under Chapter 552 (T.L.F. 228-30). The motion for a "second" examination argued that because defense counsel had Mr. Smith examined by Dr. Stacy,

respondent was entitled to have Mr. Smith examined under Chapter 552 (T.L.F. 228-30).

The trial court postponed acting on Mr. Smith's request to plead guilty (Add. Tr. 33). The court reasoned that it could not accept a guilty plea and impose death followed by a psychological examination of Mr. Smith (Add. Tr. 33). The trial court ordered that Mr. Smith be examined by Dr. Rabun, who respondent had selected, under Chapter 552 (T.L.F. 229, 231-33).

At a subsequent pretrial hearing, defense counsel emphasized they had hired Dr. Stacy as part of their case preparation and his examination was not done under Chapter 552 (Add. Tr. 41-43). Defense counsel also noted that respondent's expert was privately retained and not acting pursuant to Chapter 552 (Add. Tr. 45).

The trial court allowed respondent to substitute Drs. Peters and Kline for Dr. Rabun and provided such examination was to be conducted under Chapter 552 (T.L.F. 283-85). Drs. Peters and Kline submitted a report and an addendum report (T.L.F. 292-309, 313-15).

Dr. Stacy's pretrial report to defense counsel found Mr. Smith was then competent to proceed and to assist counsel (T.L.F. 260-61). That report, however, cautioned that because of Mr. Smith's depression his ability to assist counsel would be variable (T.L.F. 261). That variability necessitated counsel actively monitor Mr. Smith's depression and its impact on his ability to assist counsel (T.L.F. 261). The fluctuating course of Mr. Smith's depression could require that

counsel raise the question of Mr. Smith's competency to assist counsel (T.L.F. 261).

Drs. Peters' and Kline's pretrial report found Mr. Smith was competent to proceed and to assist counsel (T.L.F. 309).

During the guilt defense case, Dr. Stacy testified that at the time of the offense, Mr. Smith suffered from a mental disease or defect: major depression, recurrent type (T.Tr. 1105, 1118). Additionally, Dr. Stacy diagnosed a personality disorder, not otherwise specified with borderline paranoid and antisocial features. (T.Tr. 1118). Also, Mr. Smith was alcohol dependent (T.Tr. 1118-19). Based on those findings, Dr. Stacy concluded Mr. Smith's ability to deliberate was substantially impaired at the time of the offense (T.Tr. 1121). Mr. Smith was also acting under extreme emotional disturbance (T.Tr. 1121). At that time, Dr. Stacy found no evidence of psychosis (T.Tr. 1127).

In guilt rebuttal, respondent called Drs. Peters and Kline. They opined that Mr. Smith did not suffer from major depression (T.Tr. 1165-66, 1189-90). They diagnosed Mr. Smith as displaying a narcissistic personality disorder with obsessive compulsive traits and alcohol dependence (T.Tr. 1164-65, 1182-83, 1186-88). They opined that Mr. Smith's mental impairments had not impacted his ability to deliberate (T.Tr. 1164-65, 1188) and he had been able to coolly reflect (T.Tr. 1167, 1188-89).

B. RULE 29.15 PROCEDURAL HISTORY

After this Court affirmed Mr. Smith's convictions and sentences, he filed a pro se 29.15 motion on April 2, 2001 (R.L.F. 6-11). The pro se motion alleged claims of ineffective assistance of counsel and prosecutorial misconduct (R.L.F. 7). Mr. DeCoster, the Lewis County Prosecutor, along with Assistant Attorney General Rachel Smith, represented the respondent on the charges at issue here. The 29.15 motion alleged that Mr. DeCoster had engaged in misconduct because he had represented Mr. Smith on charges brought against him that arose before the present matters and used information acquired from that prior representation against Mr. Smith to convict and sentence him on the present matters (R.L.F. 7). The pro se motion also alleged that the respondent committed misconduct in its efforts to impeach Dr. Stacy and counsel was ineffective for failing to properly counter those attacks on Dr. Stacy (R.L.F. 7).

On July 11, 2001, the Rule 29.15 amended motion was filed (R.L.F. 263-544). The amended motion included a claim relating to counsel's ineffectiveness and respondent's prosecutorial misconduct as to billing records that were used to cross-examine Dr. Stacy (R.L.F. 347-82, 506-11). The amended motion also included a claim that Mr. DeCoster engaged in prosecutorial misconduct when he represented Mr. Smith's brother in his divorce while also seeking death against Mr. Smith (R.L.F. 451-53, 524-25).

On July 25, 2001, a letter from Mr. Smith dated June 27, 2001 and addressed to Judge Hodge was filed with the circuit court (R.L.F. 545). Mr.

Smith's letter stated that he wanted to waive all further appeals and be executed and that he was competent to do so (R.L.F. 545).

On July 30, 2001 a letter to the Circuit Clerk from Mr. Smith was filed (R.L.F. 546). Accompanying the letter was a request to dismiss the 29.15 case and an affidavit from Mr. Smith asserting his mental fitness (R.L.F. 547-48).

Relying on Mr. Smith's pro se filings, respondent filed a motion to dismiss the 29.15 case (R.L.F. 549-53). Mr. Smith's 29.15 counsel filed requests for a mental evaluation of Mr. Smith (R.L.F. 558-64, 637-707, 713-21). Those requests relied, in part, on behavior of Mr. Smith that the Chief of Mental Health Services at the Potosi Correctional Center, Dr. Gary Selbert, had documented (R.L.F. 561).

Respondent objected to the motion court ordering a mental evaluation of Mr. Smith (R.L.F. 634-36, 709-11). Respondent argued the 29.15 cause should be dismissed after the motion court merely questioned Mr. Smith about his filings (R.L.F. 634-36; R.Tr. 47-48).

Subsequently, Mr. Smith filed additional pro se documents requesting again to dismiss his 29.15 action (R.L.F. 722-23).

On July 31, 2002, the motion court heard evidence.

C. EVIDENCE WHY AN EVALUATION IS REQUIRED

Dr. Gary Selbert, the Chief of Mental Health services at Potosi Correctional Center is a licensed professional counselor who has been responsible for providing for Mr. Smith's care and mental health needs (R.Tr. 137). Dr. Selbert is employed by the State of Missouri Department of Adult Institution, Division of Offender

Rehabilitative Services and is paid by the State of Missouri (R.Tr. 131). Dr. Selbert did an initial evaluation of Mr. Smith on July 29, 1999, when Mr. Smith arrived at Potosi (R.Tr. 139-41; Ex. 5 at 196). Mr. Smith was found to be unstable, agitated, and irrational (R.Tr. 140-41; Ex. 5 at 196). At that time, Dr. Selbert was asked to furnish a DSM IV diagnosis and he relied on Dr. Stacy's report of October, 1998, to render that diagnosis (R.Tr. 141; Ex. 5 at 196). Dr. Selbert relied on Dr. Stacy's findings because Dr. Stacy had the opportunity to acquire information that was not available to Dr. Selbert and because of Dr. Stacy's experience as a forensic examiner (R.Tr. 141-42).

On August 1, 1999, Mr. Smith was found at Potosi unresponsive on the floor with a large red mass on his skull (R.Tr. 142-43; Ex. 5 at 236). He was treated at the St. John's Emergency Room (R.Tr. 142-43; Ex. 5 at 236).

Mr. Smith was placed on suicide watch on August 2, 1999 (R.Tr. 143; Ex. 5 at 193). When Dr. Selbert saw Mr. Smith that day he was agitated and thought everyone was plotting against him (R.Tr. 144; Ex. 5 at 193). Dr. Selbert was concerned that this incident might be a suicide attempt (R.Tr. 145).

Psychiatrist Dr. Reddy, M.D. evaluated Mr. Smith on August 5, 1999 (R.Tr. 145-48; Ex. 5 at 191). That evaluation found Mr. Smith was having hallucinations and delusions (R.Tr. 147; Ex. 5 at 191). Mr. Smith reported seeing images projected on the wall and believed he was receiving messages through the television (R.Tr. 147-48; Ex. 5 at 191). Dr. Reddy's diagnosis was psychotic

disorder not otherwise specified, active psychosis and depressive disorder by history (R.Tr. 148; Ex. 5 at 191).

When Dr. Reddy saw Mr. Smith on September 9, 1999, he added to his earlier diagnoses, possible bipolar disorder (R.Tr. 149; Ex. 5 at 183).

Dr. Selbert's evaluation report of October 21, 1999, included test results that found Mr. Smith expressed "bizarre and confused thinking and conduct, strange attitudes, and false beliefs." (R.Tr. 151-52; Ex. 5 at 171). In Dr. Selbert's recommendations for treatment and custody, he found that Mr. Smith "may pose a significant threat to harm himself or others on rare but unpredictable occasions." (Ex. 5 at 173).

On January 27, 2000, for the first time, Dr. Reddy diagnosed Mr. Smith as having bipolar disorder with psychotic features (R.Tr. 157; Ex. 5 at 154). Psychiatrist Dr. Jones, M.D. continued the diagnosis of bipolar disorder on September 19, 2000 (R.Tr. 158; Ex. 5 at 148).

Dr. Jones saw Mr. Smith on July 12, 2001 (R.Tr. 161; Ex. 7 at 42). Mr. Smith was not receiving his proper dosage of Risperdal (R.Tr. 161; Ex. 7 at 42). Risperdal is an anti-psychotic which is used to control impulsive behavior (R.Tr. 173). That deficiency had caused Mr. Smith to display increased anxiety, agitation and difficulty concentrating (R.Tr. 161; Ex. 7 at 42).

Dr. Jones saw Mr. Smith on October 2, 2001 and continued the diagnosis of bipolar disorder mixed with psychosis (R.Tr. 161-62; Ex. 9 at 26, 28). Mr. Smith was irritable, aggressive and feeling unable to control his temper (R.Tr. 161-62;

Ex. 9 at 26, 28). Mr. Smith also expressed concerns to Dr. Jones that his inability to concentrate would adversely impact his ability to participate in his defense (R.Tr. 162).

On October 5, 2001, Dr. Jones, requested that he be allowed to prescribe a non-formulary medication for Mr. Smith because some of the medications Mr. Smith was taking were causing him to be unable to concentrate, and therefore, not able to participate in his defense (R.Tr. 163-64; Ex. 10 at 2). Dr. Jones was concerned that Mr. Smith's irritability and aggressive urges were reaching a level where he would "snap" on others (R.Tr. 164-65; Ex. 10 at 4).

On April 25, 2002, Mr. Smith wrote to Dr. Jones and asked him to increase his Risperdal level (R.Tr. 170-71; Ex. 14 at 35). In Mr. Smith's letter to Dr. Jones, he wrote that he was "really feeling agitated" about his case and family problems and those matters had him "pretty uptight" (R.Tr. 170-71; Ex. 14 at 35)

Sometime after June 6, 2002, Mr. Smith again wrote to Dr. Jones (R.Tr. 171-72; Ex. 16 at 17). Mr. Smith told Dr. Jones that he was "feeling anxiety and depression" (R.Tr. 171-72; Ex. 16 at 17). Mr. Smith reported having awakened "with my heart in my throat" (R.Tr. 171-72; Ex. 16 at 17). Mr. Smith stated he had been feeling "down lately" which he thought must be "depression" (R.Tr. 171-72; Ex. 16 at 17). He also told Dr. Jones that the increased Risperdal level had helped his anger, but he was still in need of more help (R.Tr. 171-72; Ex. 16 at 17).

Because Dr. Selbert's function at Potosi is to provide Mr. Smith with mental health care, he is not qualified to render a forensic opinion as to whether Mr. Smith was or was not competent to waive his appeals (R.Tr. 137, 174-77). The motion court, in response to respondent's objections, refused to allow Dr. Selbert to testify that based on the treatment and care he has provided to Mr. Smith that he would recommend that the motion court order a forensic evaluation of Mr. Smith to determine his competency to waive his appeals (R.Tr. 174-77). That opinion was presented as an offer of proof (R.Tr. 174-77). Dr. Selbert held that opinion even though in July, 2002, Mr. Smith's mental health was as good as Dr. Selbert had seen it, Dr. Jones had found Mr. Smith's condition then to be stable, Dr. Selbert did not consider Mr. Smith to be a threat to harm himself or others and Mr. Smith has consistently told Dr. Selbert he wishes to waive his appeals (R.Tr. 180-82, 186-87). Because of Mr. Smith's history of suicidal tendencies, Dr. Selbert could not then rule-out that Mr. Smith was suicidal (R.Tr. 184-85).

Dr. Stacy is a forensic psychologist (R.Tr. 69-72). He has testified for the state in capital cases (R.Tr. 72-73). The Attorney General's Office recently recommended Dr. Stacy to the federal courts to do an evaluation in a federal habeas case (R.Tr. 73).

Mr. Smith's direct appeal attorney was having difficulty communicating with Mr. Smith and he asked Dr. Stacy to accompany him to meet with Mr. Smith at Potosi (R.Tr. 83-84). That meeting occurred on March 29, 2001 (R.Tr. 91). Dr. Stacy did not go to Potosi on March 29, 2001 to persuade Mr. Smith to file a Rule

29.15 motion (R.Tr. 120). He did go to Potosi with direct appeal counsel to assess Mr. Smith's mental state (R.Tr. 120). Direct appeal counsel did talk to Mr. Smith about filing a 29.15 motion and Mr. Smith decided to file one (R.Tr. 116).

Dr. Stacy reviewed Mr. Smith's Potosi mental health treatment records (R.Tr. 75-78). Dr. Stacy recommended that the motion court order a mental evaluation to determine Mr. Smith's competency to waive his appeals (R.Tr. 108-10). That opinion was based on Dr. Stacy's prior contact with Mr. Smith and review of his Potosi treatment records (R.Tr. 108-10). In particular, an evaluation was recommended because of the symptoms Mr. Smith has displayed since going to Potosi (R.Tr. 109). These symptoms have a fluctuating clinical course (R.Tr. 109). The symptoms Mr. Smith described in his letters to Dr. Jones were significant factors among all the factors that Dr. Stacy took into account in making his recommendation (R.Tr. 121-22).

Janet Diemler is a Public Defender investigator (R.Tr. 64). On July 12, 2001, Ms. Diemler and undersigned counsel went to the Potosi Correctional Center (R.Tr. 64). That was the same day that Dr. Jones had noted Mr. Smith was not receiving his proper dosage of Risperdal which caused him to display increased anxiety, agitation, and difficulty concentrating (R.Tr. 161; Ex. 7 at 42). Mr. Smith refused to come to the visiting area (R.Tr. 64-65). Ms. Diemler and undersigned counsel were taken to Mr. Smith's housing unit (R.Tr. 65). Ms. Diemler recalled that Mr. Smith stated that he did not want to meet with us (R.Tr.

65-66). He was very agitated, anxious, and pacing when Ms. Diemler saw him (R.Tr. 65-66). After two to three minutes, Mr. Smith left (R.Tr. 66).

The motion court and respondent questioned Mr. Smith (R.Tr. 189-195). Mr. Smith told the motion court that he wants to end his appeals and be executed (R.Tr. 190-91). Mr. Smith stated he would rather be executed than spend the remainder of his life at Potosi (R.Tr. 191). When the motion court asked Mr. Smith “[w]hy” he wanted to dismiss his 29.15 case he stated: “Well it all starts back in my trial attorneys. The way they tried to manipulate me. They weren’t straight up with me.” (R.Tr. 191).

When respondent questioned Mr. Smith, he indicated that he understood that if he dismissed his 29.15 case he would lose the opportunity to have claims brought in that action reviewed (R.Tr. 192-93). Mr. Smith also testified that he was aware that pursuing his appeals could result in reversal of his convictions or sentences and that at a new trial a jury could find him not guilty (R.Tr. 193). Mr. Smith stated that he was able to rationally think about his decision (R.Tr. 195).

The motion court entered findings dismissing Mr. Smith’s 29.15 case (R.L.F. 755-58). From that dismissal this appeal followed.

POINTS RELIED ON

I.

A COMPETENCY EVALUATION IS NEEDED

THE MOTION COURT CLEARLY ERRED IN DENYING THE REQUEST FOR A COURT ORDERED MENTAL EXAMINATION OF MR. SMITH TO DETERMINE HIS COMPETENCY TO WAIVE HIS 29.15 APPEAL RIGHTS BECAUSE MR. SMITH WAS DENIED HIS RIGHTS TO DUE PROCESS AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS VIII AND XIV AND MO. CONST. ART. I §§ 10 AND 21, IN THAT THERE WAS NEW EVIDENCE, ARISING AFTER MR. SMITH'S INCARCERATION AT THE POTOSI CORRECTIONAL CENTER, THAT CALLS INTO QUESTION MR. SMITH'S COMPETENCY TO FORGO HIS 29.15 RIGHTS BASED ON THE CARE POTOSI'S MENTAL HEALTH TREATMENT STAFF HAS PROVIDED, INCLUDING: DOCUMENTED PSYCHOTIC BEHAVIOR WITH A FIRST EVER RELATED DIAGNOSIS OF BIPOLAR DISORDER WITH PSYCHOTIC FEATURES, A SERIOUS SELF-INFLICTED HEAD INJURY THAT WAS TREATED AS A SUICIDE ATTEMPT, ADVERSE SIDE EFFECTS CAUSED BY PSYCHIATRIC MEDICINES THAT IMPAIRED MR. SMITH'S ABILITY TO CONCENTRATE AND PARTICIPATE IN HIS CASE, AND TWO LETTERS FROM MR. SMITH TO HIS POTOSI PSYCHIATRIST SHORTLY BEFORE THE MOTION

**COURT HEARD EVIDENCE ASKING FOR CHANGES IN HIS
MEDICATIONS TO DEAL WITH HIS DEPRESSION AND AGITATION.**

**FURTHER, SUCH AN EVALUATION WAS REQUIRED BECAUSE
BASED ON MR. SMITH'S POTOSI TREATMENT HISTORY, THE
CHIEF OF MENTAL HEALTH SERVICES AT POTOSI, DR. SELBERT,
RECOMMENDED THAT A COMPETENCY TO WAIVE 29.15 RIGHTS
EVALUATION BE PERFORMED.**

Hampton v. State, 10 S.W.3d 515 (Mo. banc 2000);

Ford v. Wainwright, 477 U.S. 399 (1986);

Rees v. Peyton, 384 U.S. 312 (1966);

State v. Wilkins, 736 S.W.2d 409 (Mo. banc 1987);

U.S. Const., Amends. VIII and XIV;

Mo. Const., Art. I, Secs. 10 and 21;

Section 552.060; and

Rule 29.15.

II.

DR. SELBERT'S RECOMMENDATION

THE MOTION COURT CLEARLY ERRED IN REFUSING TO CONSIDER THE CHIEF OF MENTAL HEALTH SERVICES FOR THE POTOSI CORRECTIONAL CENTER DR. GARY SELBERT'S OPINION THAT BASED UPON THE MENTAL HEALTH CARE THAT HE AND OTHER MEMBERS OF HIS STAFF HAVE PROVIDED TO MR. SMITH, HE WOULD RECOMMEND THAT THE MOTION COURT ORDER AN EVALUATION TO DETERMINE MR. SMITH'S COMPETENCE TO WAIVE HIS 29.15 RIGHTS BECAUSE THAT RULING DENIED MR. SMITH HIS RIGHTS TO DUE PROCESS AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VIII AND XIV AND MO. CONST. ART. I, §§ 10 AND 21, IN THAT AS A LICENSED, PROFESSIONAL COUNSELOR AND THE CHIEF OF MENTAL HEALTH SERVICES WHO WAS ULTIMATELY RESPONSIBLE FOR MR. SMITH'S MENTAL HEALTH CARE, DR. SELBERT WAS QUALIFIED TO RENDER THE OPINION THAT HE WOULD RECOMMEND THAT AN EVALUATION TO DETERMINE MR. SMITH'S COMPETENCY TO WAIVE HIS APPEALS BE ORDERED.

Alcorn v. Union Pacific Railroad Co., 50 S.W.3d 226 (Mo. banc 2001);

Herman v. American Car & Foundry Co., 245 S.W. 387 (Mo. App. 1922);

Hyman v. Great Atlanta & Pacific Tea Co., 359 Mo. 1097, 225 S.W.2d 734

(1949);

State v. Rhone, 555 S.W.2d 839 (Mo. banc 1977);

U.S. Const., Amends. VIII and XIV;

Mo. Const., Art. I, Secs. 10 and 21; and

Rule 29.15.

ARGUMENT

I.

A COMPETENCY EVALUATION IS NEEDED

THE MOTION COURT CLEARLY ERRED IN DENYING THE REQUEST FOR A COURT ORDERED MENTAL EXAMINATION OF MR. SMITH TO DETERMINE HIS COMPETENCY TO WAIVE HIS 29.15 APPEAL RIGHTS BECAUSE MR. SMITH WAS DENIED HIS RIGHTS TO DUE PROCESS AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS VIII AND XIV AND MO. CONST. ART. I §§ 10 AND 21, IN THAT THERE WAS NEW EVIDENCE, ARISING AFTER MR. SMITH'S INCARCERATION AT THE POTOSI CORRECTIONAL CENTER, THAT CALLS INTO QUESTION MR. SMITH'S COMPETENCY TO FORGO HIS 29.15 RIGHTS BASED ON THE CARE POTOSI'S MENTAL HEALTH TREATMENT STAFF HAS PROVIDED, INCLUDING: DOCUMENTED PSYCHOTIC BEHAVIOR WITH A FIRST EVER RELATED DIAGNOSIS OF BIPOLAR DISORDER WITH PSYCHOTIC FEATURES, A SERIOUS SELF-INFLICTED HEAD INJURY THAT WAS TREATED AS A SUICIDE ATTEMPT, ADVERSE SIDE EFFECTS CAUSED BY PSYCHIATRIC MEDICINES THAT IMPAIRED MR. SMITH'S ABILITY TO CONCENTRATE AND PARTICIPATE IN HIS CASE, AND TWO LETTERS FROM MR. SMITH TO HIS POTOSI PSYCHIATRIST SHORTLY BEFORE THE MOTION

**COURT HEARD EVIDENCE ASKING FOR CHANGES IN HIS
MEDICATIONS TO DEAL WITH HIS DEPRESSION AND AGITATION.**

**FURTHER, SUCH AN EVALUATION WAS REQUIRED BECAUSE
BASED ON MR. SMITH'S POTOSI TREATMENT HISTORY, THE
CHIEF OF MENTAL HEALTH SERVICES AT POTOSI, DR. SELBERT,
RECOMMENDED THAT A COMPETENCY TO WAIVE 29.15 RIGHTS
EVALUATION BE PERFORMED.**

The motion court denied a request for a mental evaluation of Mr. Smith to determine his competency to waive his 29.15 rights. That ruling was clearly erroneous because there is new evidence since Mr. Smith was convicted and sentenced to death that calls into question Mr. Smith's competency to waive his 29.15 rights. That new evidence is based on Mr. Smith's mental health treatment history since arriving at the Potosi Correctional Center. Additionally because of Mr. Smith's mental health treatment history at Potosi, its Chief of Mental Health Services, Dr. Selbert, recommended that the 29.15 court order an evaluation of Mr. Smith's competence to waive appeals. The motion court's ruling denied Mr. Smith his rights to due process and to be free from cruel and unusual punishment guaranteed under United States and Missouri Constitutions.

This Court reviews the motion court's decision for clear error. Barry v. State, 850 S.W.2d 348, 350 (Mo. banc 1993). The evidence here establishes the

motion court clearly erred in denying the request for a mental evaluation to determine Mr. Smith's competence to waive his 29.15 rights.

A. PROCEDURAL BACKGROUND

Mr. Smith sent a letter to Judge Hodge that was dated June 27, 2001 and filed with the Circuit Court on July 25, 2001 (R.L.F. 545). Mr. Smith stated that he wanted to waive all further appeals and be executed and that he was competent to make that decision (R.L.F. 545). Respondent moved to dismiss the 29.15 case and to do so without a mental evaluation (R.L.F. 549-53, 634-36, 709-11). Rule 29.15 counsel moved for a mental evaluation (R.L.F. 558-64, 637-707, 713-21; R.Tr. 45-47, 57-58). On January 7, 2002, Mr. Smith filed additional pro se documents requesting his case be dismissed (R.L.F. 722-23).¹ The motion court held a hearing on July 31, 2002.

B. COMPETENCY CASELAW STANDARDS

Courts must indulge every reasonable presumption against the waiver of fundamental constitutional rights. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). It is recognized that “[i]f a judge at any stage of a criminal proceeding has reasonable cause to believe the accused, as a result of mental disease or defect, lacks capacity to understand the proceedings against him or to assist in his defense, the judge must order a mental examination.” State v. Messenheimer, 817

¹ On January 29, 2002, Mr. Smith also filed documents with this Court requesting all appeals be ended and an execution date set.

S.W.2d 273, 278 (Mo. App., S.D. 1991). See, also, Drope v. Missouri, 420 U.S. 162, 180 (1975).

The noted principles apply equally to a convicted defendant's stated desires to dismiss postconviction proceedings. In Rees v. Peyton, 384 U.S. 312, 312-13 (1966) (per curiam) the federal habeas corpus petitioner was sentenced to death in state court. The petitioner commenced federal habeas corpus proceedings in the District Court. Rees, 384 U.S. at 313. The District Court and then the Court of Appeals denied relief. Rees, 384 U.S. at 313. With Rees' consent, his counsel filed for certiorari review of the denial of habeas corpus relief with the United States Supreme Court. Rees, 384 U.S. at 313. After the certiorari petition was filed, Rees directed counsel to withdraw that petition and to cease all further appeals. Rees, 384 U.S. at 313. Rees' counsel informed the Court that he could not conscientiously accede to Rees' request without a psychiatric examination because of doubts he held as to Rees' competency. Rees, 384 U.S. at 313. Because of the questions raised as to Rees' competency, the Supreme Court ordered the case remanded for a determination as to Rees' competency to forgo further appeals. Rees, 384 U.S. at 313-14. The District Court was directed "to determine Rees' mental competence in the present posture of things, that is, whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning [sic] further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." Rees, 384 U.S. at 314. The

Court indicated that “[u]ntil that step has been taken (a hearing on competency), we do not consider ourselves in a position to determine what disposition should be made of Rees’ petition for certiorari.” Rees, 384 U.S. at 314.

Mr. Smith’s case closely parallels what occurred in Rees and requires the same result. Mr. Smith, like Rees, initially decided to pursue those post-conviction appeal rights available to him. Both Mr. Smith and Rees subsequently decided to prematurely end their appeals, and thereby, cause each to be executed. The 29.15 motion court was apprised, like the Supreme Court was apprised in Rees, that there was reason for counsel to question Mr. Smith’s competence. Specifically, the motion court was advised that Dr. Selbert had prepared a report on October 21, 1999 that included discussion of Mr. Smith’s psychotic behavior, “bizarre and confused thinking,” and treatment for those impairments (R.L.F 561; Ex 5 at 171-72). Despite the motion court having this information, it failed to order the evaluation that was required under Rees.

This Court’s decision in Hampton v. State, 10 S.W.3d 515 (Mo. banc 2000) follows from what the United States Supreme Court did in Rees. In Hampton, this Court found that it was proper for the motion court to have dismissed Hampton’s Rule 29.15 action because there was “[n]o new evidence” suggesting Hampton was incompetent to waive his 29.15 rights and to be executed. Hampton, 10 S.W.3d at 516-17 (see references “No new evidence”; “In the absence of any new evidence”; “and the lack of new evidence”). Here, there is “new evidence” under Hampton which calls into question Mr. Smith’s competence to

waive his 29.15 rights. A mental evaluation is required before the motion court – or this Court – can properly determine what disposition of Mr. Smith’s case should be made.

In Ford v. Wainwright, 477 U.S. 399, 410 (1986), the Court recognized that the Eighth Amendment forbids executing a prisoner who is mentally incompetent. See, also, §552.060.1. It would be contrary to the principles recognized in Ford v. Wainwright to allow someone, like Mr. Smith, about whom there is new evidence to doubt his competency, to waive his 29.15 rights so as to be executed without first having a determination as to his competency to waive those rights.

C. NEW EVIDENCE CALLING INTO QUESTION

MR. SMITH’S COMPETENCE

The evidence that was presented to the motion court established under both Rees and Hampton that an evaluation was required. Dr. Selbert’s initial evaluation on July 29, 1999, found Mr. Smith was unstable, agitated and irrational (R.Tr. 139-41; Ex. 5 at 196). On August 1, 1999, Mr. Smith was discovered unresponsive on the floor with a large red mass on his skull (R.Tr. 142-43; Ex. 5 at 236). Mr. Smith’s head injury was treated at the St. John’s Emergency Room (R.Tr. 142-43; Ex. 5 at 236). Mr. Smith was placed on suicide watch on August 2, 1999 (R.Tr. 143; Ex. 5 at 193). When Dr. Selbert saw Mr. Smith on August 2, 1999, he was agitated and thought everyone was plotting against him (R.Tr. 144; Ex. 5 at 193). Dr. Selbert was concerned that Mr. Smith’s injuries occurred during a suicide attempt (R.Tr. 145).

On August 5, 1999, Potosi psychiatrist, Dr. Reddy found Mr. Smith was having hallucinations and delusions (R.Tr. 145-48; Ex. 5 at 191). Mr. Smith reported seeing images projected on the wall and believed he was receiving messages through the television (R.Tr. 147-48; Ex. 5 at 191). Dr. Reddy's diagnosis was psychotic disorder not otherwise specified, active psychosis and depressive disorder by history (R.Tr. 148; Ex. 5 at 191).

Dr. Reddy saw Mr. Smith on September 9, 1999 and added possible bipolar disorder to his earlier diagnosis (R.Tr. 149; Ex. 5 at 183).

Dr. Selbert's October 21, 1999 report recounted test results that found Mr. Smith expressed "bizarre and confused thinking and conduct, strange attitudes, and false beliefs." (R.Tr. 151-52; Ex. 5 at 171). Dr. Selbert's findings included that Mr. Smith "may pose a significant threat to harm himself or others on rare but unpredictable occasions" (Ex. 5 at 173).

Dr. Reddy diagnosed Mr. Smith for the first time on January 27, 2000, as suffering from bipolar disorder with psychotic features and prescribed drugs used to treat his symptoms (R.Tr. 157; Ex. 5 at 154). Psychiatrist Dr. Jones continued the same diagnosis on September 19, 2000, prescribing medications for Mr. Smith's symptoms (R.Tr. 158; Ex. 5 at 148).

When Dr. Jones saw Mr. Smith on July 12, 2001, he was not receiving his proper dosage of the anti-psychotic Risperdal (R.Tr. 161, 173; Ex. 7 at 42). That decreased dosage caused Mr. Smith to display increased anxiety, agitation, and difficulty concentrating (R.Tr. 161; Ex. 7 at 42).

Dr. Jones saw Mr. Smith on October 2, 2001 and maintained the diagnosis of bipolar disorder mixed with psychosis (R.Tr. 161-62; Ex. 9 at 26, 28). Mr. Smith was irritable, aggressive and feeling unable to control his temper (R.Tr. 161-62; Ex. 9 at 26, 28). Mr. Smith told Dr. Jones that he was concerned that his inability to concentrate would adversely impact his ability to participate in his defense (R.Tr. 162).

Dr. Jones, on October 5, 2001, requested that he be allowed to prescribe a non-formulary medication because some of Mr. Smith's medications were causing him to be unable to concentrate, and therefore, not able to participate in his defense (R.Tr. 163-64; Ex. 10 at 2). In making the case for prescribing a non-formulary, Dr. Jones noted that he had already tried using four other anti-psychotic medications without success (R.Tr. 163-66; Ex. 10 at 2, 4-6). Dr. Jones was concerned that Mr. Smith's irritability and aggressive urges were reaching the point where he would "snap" on others (R.Tr. 164-65; Ex. 10 at 4).

On October 9, 2001, Dr. Jones found Mr. Smith was feeling aggressive and "hyper irritable" (R.Tr. 166-68; Ex. 9 at 31, 33, 35). Mr. Smith's aggressive feelings continued to pose a problem because he felt "like snapping on others" (R.Tr. 166-68; Ex. 9 at 31, 33, 35).

Mr. Smith wrote to Dr. Jones on April 25, 2002 and requested that his anti-psychotic drug used to control impulsive behavior, Risperdal, be increased (R.Tr. 170-71, 173; Ex. 14 at 35). Mr. Smith's letter to Dr. Jones included him writing

that he was “really feeling agitated” about his case and family problems and these matters caused him to be “pretty uptight” (R.Tr. 170-71; Ex. 14 at 35).

On May 17, 2002, Mr. Smith had complaints of anxiety and depression as well as generalized feelings of a depressed mood (Ex. 16 at 18).

A second letter, written sometime after June 6, 2002, was sent by Mr. Smith to Dr. Jones (R.Tr. 171-72; Ex. 16 at 17). Mr. Smith described in that letter “feeling anxiety and depression” (R.Tr. 171-72; Ex. 16 at 17). He described waking-up “with my heart in my throat” (R.Tr. 171-72; Ex. 16 at 17). Mr. Smith added that he had been feeling “down lately” which he thought must be “depression” (R.Tr. 171-72; Ex. 16 at 17). Dr. Selbert noted generally that Mr. Smith’s depressed mood was not something that was simply a result of being in prison or being in prison with a death sentence, but rather the product of his bipolar disorder (R.Tr. 159-61). Mr. Smith also told Dr. Jones that the increased Risperdal level had helped his anger, but he still needed more help (R.Tr. 171-72; Ex. 16 at 17).

Based on the treatment and care Dr. Selbert has provided to Mr. Smith, he recommended that the motion court order a mental evaluation to determine Mr. Smith’s competence to waive his appeals (R.Tr.174-77).² Dr. Selbert noted that Dr. Jones had found Mr. Smith’s condition only to be stable for someone who has Mr. Smith’s diagnosis and who is receiving medications and counseling for his mental health problems (R.Tr. 183-84).

Forensic psychologist Dr. Stacy has testified for the State in capital cases and the Attorney General's Office has recommended him to do federal habeas casework (R.Tr. 69-73). Dr. Stacy submitted a pretrial report to defense counsel which concluded Mr. Smith was competent to proceed and to assist counsel (T.L.F. 260-61). In guilt phase, Dr. Stacy testified that at the time of the offense Mr. Smith suffered from a mental disease or defect, major depression, recurrent type (T.Tr. 1105, 1108). Dr. Stacy's pretrial diagnosis also included personality disorder, not otherwise specified with borderline paranoid and antisocial features and alcohol dependence (T.Tr. 1118-19). Dr. Stacy found no evidence of psychosis pretrial (T.Tr. 1127). At direct appeal counsel's request, Dr. Stacy accompanied direct appeal counsel to Potosi to meet with Mr. Smith and did so on March 29, 2001 (R.Tr. 83-84, 91).

Dr. Stacy reviewed Mr. Smith's Potosi mental health treatment records (R.Tr. 75-78). Dr. Stacy recommended that the motion court order a mental evaluation to determine Mr. Smith's competency to waive his appeals (R.Tr. 108-10). That recommendation was based on Dr. Stacy's prior contacts with Mr. Smith and his review of Mr. Smith's Potosi records (R.Tr. 108-10). An evaluation was warranted because of the symptomology Mr. Smith has displayed since going to Potosi (R.Tr. 109). Those symptoms present a fluctuating clinical course (R.Tr. 109). The symptoms that Mr. Smith described in his two letters to Dr. Jones were significant factors amongst all those Dr. Stacy considered (R.Tr. 121-22).

² See Point II for why this testimony was only allowed as an offer of proof.

As noted supra, on July 12, 2001, Dr. Jones observed increased anxiety, agitation, and difficulty concentrating by Mr. Smith that was due to him not receiving his proper dosage of his anti-psychotic drug, Risperdal (R.Tr. 161, 173; Ex. 7 at 42). On that same day, Public Defender Investigator Ms. Diemler and undersigned counsel attempted to meet with Mr. Smith (R.Tr. 64). When Mr. Smith refused to come to the visiting area, Ms. Diemler and undersigned counsel were taken to Mr. Smith's housing unit (R.Tr. 64-65). Mr. Smith stated he did not want to meet with us and he was very agitated, anxious, and pacing (R.Tr. 65-66). Mr. Smith left after two to three minutes (R.Tr. 66-67). Moreover, during this same time period that Mr. Smith was not receiving his proper Risperdal dose, on June 27, 2001 (R.L.F. 545), he prepared his letter that he sent to Judge Hodge asking to dismiss his case. That the improper Risperdal dosage and the original filing to dismiss occurred together serves only to call into question further whether Mr. Smith acted competently when he filed his request to dismiss.

Under Hampton supra there was "new evidence" that required the motion court order an evaluation to determine Mr. Smith's competence to waive his appeals. That new evidence reflects that since arriving at Potosi Mr. Smith has displayed psychotic behavior. Moreover, since arriving at Potosi, the mental health professionals responsible for Mr. Smith's care have diagnosed him for the first time ever as suffering from bipolar disorder with psychotic features. While at Potosi, Mr. Smith sustained a serious head injury which was treated as a suicide attempt. When Dr. Jones saw Mr. Smith on October 2, 2001, Mr. Smith told Dr.

Jones that he was concerned that his inability to concentrate would adversely impact his ability to participate in his defense – a position that is directly at odds with the documents he has filed in circuit court and this Court.

The motion court heard evidence on July 31, 2002. As recently as April and June, 2002, Mr. Smith had sent his treating psychiatrist Dr. Jones, letters outlining his concerns about his agitation, anxiety, and depressed mood, while requesting an increase in his anti-psychotic medication. The proximity of those complaints to when the motion court heard evidence underscores the need for a mental evaluation now.

All of the noted factors involving Mr. Smith's mental health treatment and care constitute "new evidence" under Hampton which warrant a mental evaluation. Besides these factors, Dr. Selbert, the Chief of Mental Health Services at Potosi who is employed by the State, and charged with ultimate responsibility for Mr. Smith's care, recommended that the motion court order an evaluation to determine Mr. Smith's competency to waive his 29.15 rights. Because of Mr. Smith's suicidal tendencies history, Dr. Selbert, however, could not rule-out that Mr. Smith was suicidal (R.Tr. 184-85). That suicidal history included Dr. Selbert's October 21, 1999 report finding that Mr. Smith could pose a harm to himself on "unpredictable occasions." (Ex. 5 at 173). Dr. Stacy, who has testified for the state in capital cases and who the Attorney General has recommended to the federal court, also recommended an evaluation be ordered.

The need for an evaluation is also apparent from the irreconcilable nature of the claims found in Mr. Smith's pro se motion commencing his 29.15 case and his later request to dismiss. The pro se motion was filed April 2, 2001 (R.L.F. 671). The pro se motion alleged that the Lewis County prosecutor, Mr. DeCoster, committed misconduct because he had represented Mr. Smith on charges brought against him that arose before the present matters and used information gained in that prior representation against Mr. Smith to convict and sentence him on the present matters (R.L.F. 7). The pro se motion also alleged prosecutorial misconduct and ineffective assistance of counsel as to matters relating to respondent's efforts to impeach Dr. Stacy (R.L.F. 7).

On July 11, 2001, the amended 29.15 motion was filed (R.L.F. 263-544). The amended motion included a claim relating to counsel's ineffectiveness and respondent's prosecutorial misconduct as to billing records that were used to cross-examine Dr. Stacy (R.L.F. 347-82, 506-11). The amended motion also alleged a claim as to Mr. DeCoster's prosecutorial misconduct when he represented Mr. Smith's brother in his divorce while also seeking death against Mr. Smith here (R.L.F. 451-53, 524-25). These claims in the amended motion reflect that matters of the type Mr. Smith wanted pursued in his pro se filings, claims of prosecutorial misconduct, were in fact carried forward in the amended motion, but Mr. Smith has moved to dismiss. Mr. Smith's drastic shift in positions from April, 2001 to July, 2001 on the matters involving prosecutorial misconduct,

itself is reason for calling into question whether Mr. Smith was acting competently in making his request to dismiss.

That radical shift in positions on whether to pursue a 29.15 action is consistent with the competency concerns Dr. Stacy identified for trial counsel and his cautionary advice to them on that issue. Prior to trial, Dr. Stacy had found Mr. Smith was competent to proceed and to assist counsel (T.L.F. 260-61). He cautioned though that because of Mr. Smith's depression his ability to assist counsel would vary (T.L.F. 261). That fluctuating course required counsel carefully monitor Mr. Smith's depression and its impact on his ability to assist counsel (T.L.F. 261). The variable course of Mr. Smith's depression could necessitate that counsel raise the question of Mr. Smith's competency to assist counsel (T.L.F. 261).

Mr. Smith's testimony before Judge Hodge on July 31, 2002 also underscores the need for an evaluation. When the motion court asked Mr. Smith "[w]hy" he wanted to dismiss his 29.15 case he stated: "Well it all starts back in my trial attorneys. The way they tried to manipulate me. They weren't straight up with me" (R.Tr. 191). For someone who believes that his trial attorneys were not "straight up" with him to furnish that as reason for wanting to dismiss his 29.15 case simply highlights why there is a reason to question Mr. Smith's competence. Mr. Smith's stated reason for dismissing is why one would otherwise expect he should want to continue on with his 29.15 case and not want to dismiss it.

All of the noted matters raised substantial questions about Mr. Smith's competence to waive his 29.15 rights. Because these matters created substantial questions about Mr. Smith's competence, the motion court was required under Rees to order an evaluation to determine Mr. Smith's competency to waive his 29.15 rights. Additionally, these matters constituted "new evidence" under Hampton that required a competency evaluation.

D. THE MOTION COURT'S CLEARLY ERRONEOUS FINDINGS

In dismissing Mr. Smith's 29.15 case, the motion court found that Dr. Stacy did not express an opinion as to Mr. Smith's competence to dismiss his 29.15 case (R.L.F. 756-57). The motion court also found that Dr. Selbert testified that Mr. Smith's "mental health has been stabilized" (R.L.F. 757). The motion court found that Dr. Selbert "acknowledged that Movant continues to insist that he does not wish to pursue his appeal on his post-conviction motion." (R.L.F. 757). The motion court found that in testifying Mr. Smith appeared "rational and coherent." (R.L.F. 757). Further, the motion court ruled that Mr. Smith does not presently suffer from a mental disease or defect that impacts his ability to understand the rights that he was waiving (R.L.F. 758).

These findings are all clearly erroneous. The motion court's findings as to Dr. Stacy and Dr. Selbert are clearly erroneously because it ignores the same conclusion that both reached - an evaluation should be done. Dr. Stacy did not express an opinion on Mr. Smith's competence to waive his 29.15 rights. Dr. Stacy did, however, recommend to the court that based on Mr. Smith's treatment

history at Potosi there should now be an evaluation conducted. See discussion supra. Likewise, while Dr. Selbert testified that Dr. Jones had in his most recent meeting found Mr. Smith's condition had stabilized, he also recommended that based on Mr. Smith's Potosi treatment history that a mental evaluation to waive appeals be ordered.

Even though Mr. Smith has consistently told Dr. Selbert he wanted to waive his appeals (R.Tr. 186-87), he also told Dr. Jones on October 2, 2001 that he was concerned his inability to concentrate would adversely impact his ability to participate in his defense (R.Tr. 162). Thus, Mr. Smith has not been consistent with his treatment care providers as to whether he desires to continue the appeal process. That inconsistency serves to underscore Dr. Stacy's trial concerns, equally valid here, that it would be necessary for counsel to diligently monitor Mr. Smith's competency and to raise with the court doubts about his competency because of the fluctuating nature of his depressive symptoms.

The motion court's reliance on Mr. Smith's in-court "rational and coherent" appearance to find Mr. Smith does not suffer from a mental disease or defect that impacts his ability to understand the rights he is waiving finding is inconsistent with what this Court did in State v. Wilkins, 736 S.W.2d 409 (Mo. banc 1987). There, the defendant pled guilty and was sentenced to death. Wilkins, 736 S.W.2d at 410. Wilkins, proceeding pro se, did not seek to appeal. Wilkins, 736 S.W.2d at 411. This Court appointed the Public Defender to represent Wilkins and at oral argument this Court heard in-court statements personally from Wilkins. Wilkins,

736 S.W.2d at 411. Wilkins’ statements to this Court included taking issue with some of the Public Defender’s argument. Wilkins, 736 S.W.2d at 411. After hearing those statements from Wilkins, this Court ordered Wilkins examined by the Department of Mental Health to determine Wilkins’ competence to waive counsel on appeal. Wilkins, 736 S.W.2d at 411. The motion court should have done the same here after hearing Mr. Smith’s statement that the reason why he was dismissing his 29.15 case was because his trial attorneys had not been “straight up” with him. See supra. The irrational nature of that reason for dismissing required doing what this Court did in Wilkins – ordering an examination.

There was no basis for the finding that Mr. Smith does not suffer from a mental disease or defect that impacts his ability to understand the rights that he is waiving. Mr. Smith’s diagnosis is bipolar disorder with psychotic features. Without a mental evaluation by a forensic examiner who is qualified to determine the impact of that newly diagnosed disorder on competency, there was no grounds for finding that Mr. Smith’s mental disorder did not impact his ability to understand the rights he was abandoning.

There was substantial new evidence presented to the motion court that called into question Mr. Smith’s competence to waive his appeals under Rees and Hampton. This Court should reverse and remand this cause with directions that the motion court order a mental evaluation of Mr. Smith.

II.

DR. SELBERT'S RECOMMENDATION

THE MOTION COURT CLEARLY ERRED IN REFUSING TO CONSIDER THE CHIEF OF MENTAL HEALTH SERVICES FOR THE POTOSI CORRECTIONAL CENTER DR. GARY SELBERT'S OPINION THAT BASED UPON THE MENTAL HEALTH CARE THAT HE AND OTHER MEMBERS OF HIS STAFF HAVE PROVIDED TO MR. SMITH, HE WOULD RECOMMEND THAT THE MOTION COURT ORDER AN EVALUATION TO DETERMINE MR. SMITH'S COMPETENCE TO WAIVE HIS 29.15 RIGHTS BECAUSE THAT RULING DENIED MR. SMITH HIS RIGHTS TO DUE PROCESS AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT, U.S. CONST. AMENDS. VIII AND XIV AND MO. CONST. ART. I, §§ 10 AND 21, IN THAT AS A LICENSED, PROFESSIONAL COUNSELOR AND THE CHIEF OF MENTAL HEALTH SERVICES WHO WAS ULTIMATELY RESPONSIBLE FOR MR. SMITH'S MENTAL HEALTH CARE, DR. SELBERT WAS QUALIFIED TO RENDER THE OPINION THAT HE WOULD RECOMMEND THAT AN EVALUATION TO DETERMINE MR. SMITH'S COMPETENCY TO WAIVE HIS APPEALS BE ORDERED.

The motion court refused to consider Dr. Selbert's opinion that he would recommend that the motion court order an evaluation of Mr. Smith to determine

his competency to waive his appeals. In his role as the Chief of Mental Health Services at Potosi who was ultimately responsible for Mr. Smith's mental health care, Dr. Selbert was qualified to furnish that opinion. The motion court's ruling denied Mr. Smith his rights to due process and to be free from cruel and unusual punishment guaranteed under the United States and Missouri Constitutions.

A. CASELAW STANDARDS

This Court reviews for clear error. Barry v. State, 850 S.W.2d 348, 350 (Mo. banc 1993).

A witness is an expert if the witness has “sufficient experience and acquaintance with the phenomena involved to testify as an expert.” State v. Rhone, 555 S.W.2d 839, 841 (Mo. banc 1977) (quoting Hyman v. Great Atlanta & Pacific Tea Co., 359 Mo. 1097, 1101, 225 S.W.2d 734, 736 (1949)). More particularly, a “witness may be competent to testify as an expert though his knowledge touching the question at issue may have been gained by practical experience rather than by scientific study or research.” Rhone, 555 S.W.2d at 841 (quoting Herman v. American Car & Foundry Co., 245 S.W. 387, 389 (Mo. App. 1922)). This Court has recognized that “[i]n general, [an] expert's opinion will be admissible, unless the expert's information is so slight as to render the opinion fundamentally unsupported.” Alcorn v. Union Pacific Railroad Co., 50 S.W.3d 226, 246 (Mo. banc 2001).

B. DR. SELBERT WAS QUALIFIED TO RECOMMEND
AN EVALUATION

Dr. Selbert is the Chief of Mental Health Services at the Potosi Correctional Center (R.Tr. 130). He has held that position for over three years (R.Tr. 130). As Chief of Mental Health Services, Dr. Selbert works with inmates by providing mental health services (R.Tr. 130). Dr. Selbert is employed by the State of Missouri Department of Adult Institution, Division of Offender Rehabilitative Services and is paid by the State of Missouri (R.Tr. 131). Dr. Selbert is a licensed professional counselor who has been responsible for providing for Mr. Smith's care and mental health needs (R.Tr. 137). Dr. Selbert is not certified as a forensic examiner (R.Tr. 137). In providing mental health care to Mr. Smith, a team approach was followed and information shared among the team members (R.Tr. 138-139). The team has included Dr. Selbert, Ms. Meinershagen, Dr. Reddy, and Dr. Jones (R.Tr. 137-38). Dr. Selbert's responsibilities included assessing Mr. Smith's mental status and referring him to the Potosi psychiatrist (R.Tr. 138). The team members utilize and follow for purposes of diagnoses, the Diagnostic and Statistical Manual of Mental Disorders (D.S.M.) (R.Tr. 150).

Dr. Selbert did an initial evaluation of Mr. Smith on July 29, 1999, when Mr. Smith arrived at Potosi (R.Tr. 139-41; Ex. 5 at 196). At that time, Dr. Selbert found Mr. Smith was unstable, agitated, and irrational (R.Tr. 140-41; Ex. 5 at 196).

Dr. Selbert saw Mr. Smith on August 2, 1999, after Mr. Smith was found unresponsive with a large red mass on his skull and Dr. Selbert treated this incident as a suicide attempt (R.Tr. 142-45; Ex. 5 at 193, 236). Dr. Selbert found that Mr. Smith was “very agitated” (R.Tr. 143-44; Ex. 5 at 193). Dr. Selbert followed-up with Mr. Smith on August 6, 1999 in order to recommend a plan of care (R.Tr. 144-45; Ex. 5 at 174).

On October 21, 1999, Dr. Selbert did an eleven page psychological evaluation of Mr. Smith (R.Tr. 150-54; Ex. 5 at 163-73). That report included test results that found Mr. Smith expressed “bizarre and confused thinking and conduct, strange attitudes, and false beliefs.” (R.Tr. 151-52; Ex. 5 at 171). The “CLINICAL IMPRESSIONS’ section of Dr. Selbert’s report noted that Mr. Smith has “a tendency to misinterpret the motives and intentions of others.” (R.Tr. 153-54; Ex. 5 at 172-73). Under “RECOMMENDATIONS FOR TREATMENT AND CUSTODY” Dr. Selbert found: “John Smith may pose a significant threat to harm himself or others on rare but unpredictable occasions.” (R.Tr. 153-54; Ex. 5 at 173). Under “DIAGNOSIS (DSM IV),” Dr. Selbert’s report contained entries for Axis I through Axis V (Ex. 5 at 173). Axis I included: (a) “296.34” - major depressive disorder, recurrent, severe with psychotic features and possible bipolar disorder; and (b) “303.90” – alcohol dependence with physiological dependence, in remission in a controlled environment (Ex. 5 at 173). Axis II found “301.9” – personality disorder, not otherwise specified, mixed with borderline, paranoid, antisocial, and psychotic features (Ex. 5 at 173).

On June 25, 2001, Dr. Selbert completed an Individual Treatment Plan for Mr. Smith (Ex. 7 at 50). For the “DSM DX” Dr. Selbert listed Mr. Smith’s Axis I diagnosis of bipolar affective disorder, mixed (Ex. 7 at 50). Among the “Problems” Dr. Selbert identified were: “[s]truggling with distorted thinking about self, which includes pessimism and hopelessness” (Ex. 7 at 50). Dr. Selbert indicated that Mr. Smith would display these problems whether Mr. Smith was in prison or not and whether he was on death row or not (R.Tr. 160-61). The “Goals” for Mr. Smith included: “[d]evelop new thinking patterns to replace distorted ones.” (Ex. 7 at 50).

Until December 1, 2001, as a licensed professional counselor, Dr. Selbert was required to make DSM IV diagnoses (R.Tr. 178-79, 182-83). When some privatization of services occurred, Dr. Selbert was directed as of December 1, 2001 to provide only assessment information, but not diagnoses (R.Tr. 178-79). All of the opinions Dr. Selbert expressed were based on the care he, as a mental health practitioner, had provided to Mr. Smith at Potosi (R.Tr. 177).

C. MOTION COURT’S REFUSAL TO CONSIDER DR. SELBERT’S

RECOMMENDATION OF AN EXAMINATION

In response to the State’s objection, the motion court refused to consider Dr. Selbert’s recommendation that Mr. Smith be evaluated to determine his competence to waive his 29.15 rights (R.Tr. 173-77).

The record on this matter was as follows:

Q. Dr. Selbert, in providing the care that you have provided to Mr. Smith--along with people like Dr. Reddy and Ms. Meinershagen, Dr. Jones, I think--I haven't missed anyone, have I?

A. I don't think so.

Q. Okay. Do you have an opinion now, based upon the care that all of you have provided to him, as to whether you would recommend to the Court that it order an evaluation of him as to his competency to forego [sic] all further appeals at this time, whether that would be something that you would recommend that the Court do?

A. I--I would just have to say that as--

MR. BRUCE: I'm sorry. I'm going to object to the--to the answer.

MR. SWIFT: Okay.

MR. BRUCE: I'm sorry to interrupt. I don't believe a foundation has been laid for this witness to be able to give that opinion in this case.

THE COURT: Overruled. Proceed.

BY MR. SWIFT:

Q. Dr. Selbert, have--have you formed an opinion, based upon the care that you provided to Mr. Smith in conjunction with these other mental health care providers, as to a recommendation that you would have for the Court as to whether you would recommend that a comprehensive mental

evaluation be done on Mr. Smith to determine his competency to waive his appeals?

A. I would say that providing mental health care in a facility like Potosi is--has a different focus than forensic psychology or psychiatry. And that our concern is not generally with those issues. Our concern is trying to help him to cope with his life there. And I didn't--It was never my intent to get involved with any thing [sic] that would compromise that relationship because it's critical. It's --We're not--Our focus is not geared towards determining his guilt or innocence or his competency. It's guilt--It's geared towards providing comfort in times of distress. And I don't feel like myself or the staff that I have are qualified to make forensic determinations.

Q. So you yourself are not qualified to render a forensic opinion about his mental status. Is that something that you would recommend being done at this point in time?

THE COURT: I'm going to have to back up and sustain the last objection. I think he has disqualified himself by his recent testimony. That objection will be sustained. He's indicated he's not qualified to make that recommendation.

BY MR. SWIFT:

Q. Dr. Selbert, as I understand your testimony, you've indicated that you are not competent to—to perform a forensic examination; is that correct?

A. That's correct.

Q. Okay. Based upon treatment you've provided to Mr. Smith, because you lack those expertise, would you recommend to the Court that that be done to determine whether Mr. Smith can properly waive his appeals?

MR. BRUCE: I make the same objection based—

THE COURT: Sustained.

MR. SWIFT: Judge, I'd like to elicit Dr. Selbert's

THE COURT: All right. You may make an offer of proof if you want.

MR. SWIFT: As an offer of proof.

THE COURT: Go ahead. You may answer the question sir.

THE WITNESS: Maybe--Could I rephrase the question?

THE COURT: No, sir. Answer the question that was asked.

THE WITNESS: All right. Then could I ask you to repeat it, please?

BY MR. SWIFT:

Q. Dr. Selbert, you said you yourself and your staff are not in the business, as I understand it, of doing forensic examinations.

A. Correct.

Q. Okay. But you are in the business of providing care to people like Mr. Smith?

A. Correct.

Q. Okay. In the process of providing the type of care that you provide to Mr. Smith, have you formed an opinion that you would recommend to the Court that before Mr. Smith waives his appeals that the Court order an evaluation of him to determine his competency to waive his appeals?

A. Yes. It's my opinion that he should have further evaluation. That the evaluation that my staff has provided isn't geared towards that end.

MR. SWIFT: Judge, I'd ask the Court to reconsider its ruling in light of Dr. Selbert's testimony here and the offer of proof and--and reverse its--

THE COURT: You made a record on the offer of proof. The objection is sustained.

BY MR. SWIFT:

Q. Dr. Selbert, just for clarity, in terms of the opinions that you've expressed here today, is that based upon--that is based upon the care that you as a mental health practitioner has [sic] provided to Mr. Smith during his stay at Potosi; is that correct?

A. Yes.

Q. And that commenced when--that care commenced when he came to Potosi after being convicted of first degree murder and sentenced to death; is that correct?

A. That's correct.

(R.Tr.173-77).

Dr. Selbert is a licensed professional counselor who was the Chief of Mental Health Services at Potosi. He was part of a team of mental health care providers who were responsible for Mr. Smith's care. In that role, the team utilized and followed the DSM IV and for most of the relevant time Dr. Selbert was required to make DSM IV diagnoses as to Mr. Smith. Dr. Selbert's work included making an initial assessment of Mr. Smith, referring him to the Potosi psychiatrist, providing crisis intervention for Mr. Smith's suicide attempt, providing evaluations, and formulating individual treatment plans. See discussion supra. These experiences gained through Dr. Selbert's participation in Mr. Smith's care made him uniquely qualified to recommend to the motion court that a mental evaluation of Mr. Smith be conducted. See Rhone, supra. This was not a case where Dr. Selbert's information was "so slight" to cause his opinion to be fundamentally unsupported. See Alcorn, supra.

The motion court's fundamental error was its flawed reasoning that because Dr. Selbert testified he was not qualified to himself perform a forensic examination to determine whether Mr. Smith was competent to waive his 29.15 rights and not his function as a Potosi mental health care provider that those circumstances meant he could not recommend such an evaluation be performed. As a licensed professional counselor and Chief of Mental Health Services responsible for and intricately participating in Mr. Smith's care, Dr. Selbert was uniquely qualified to recommend Mr. Smith be evaluated by a mental health practitioner whose expertise includes determining Mr. Smith's competence to

waive his 29.15 rights. It would be illogical and an anomalous result that Dr. Selbert was charged by the State of Missouri with recommending Mr. Smith see the Potosi psychiatrist, but he could not also recommend to the motion court that an examiner experienced in making determinations as to competency to waive appeal rights evaluate Mr. Smith because the State of Missouri objected to that recommendation.

In its questioning of Dr. Selbert, respondent attempted to suggest that this Court's decision in Johnson v. State, 58 S.W.3d 496 (Mo. banc 2001) rendered Dr. Selbert unqualified to recommend Mr. Smith be evaluated as to his competency to waive his 29.15 rights (See R.Tr. 178-79). In Johnson, this Court reversed the finding that Johnson was a sexually violent predator. There, the State presented diagnoses through a department of corrections employee, Hoeflein, who was working towards becoming a licensed counselor. Johnson, 58 S.W.3d at 497-99. Hoeflein worked under a psychologist and his reports had to be approved by a licensed psychologist. Johnson, 58 S.W.3d at 498. This Court reversed the sexual predator finding because the diagnoses Hoeflein furnished as an expert should not have been allowed because they had to be approved and reviewed by a supervising licensed psychologist, and thus, his diagnoses were not even arguably within his area of expertise. Johnson, 58 S.W.3d at 499.

Dr. Selbert was a licensed professional counselor who was the Chief of Mental Health Services at Potosi. He was not required to have his work reviewed

and approved. Moreover, Dr. Selbert was not asked to provide diagnoses, but rather whether he would recommend Mr. Smith be evaluated.

This Court should consider Dr. Selbert's recommendation, along with all the other matters discussed in Point I, and order a mental evaluation to determine Mr. Smith's competency to waive his 29.15 rights. Alternatively, this Court should reverse and remand this cause with directions that the motion court consider Dr. Selbert's recommendation that an evaluation of Mr. Smith should be ordered and reconsider its ruling denying an evaluation in light of Dr. Selbert's recommendation.

CONCLUSION

For the reasons discussed in Point I, the motion court heard substantial new evidence that calls into question whether Mr. Smith is competent to forgo his 29.15 rights. Because there was substantial new evidence to question whether Mr. Smith was competent, this Court should reverse and remand with directions that the motion court order a mental evaluation of Mr. Smith to determine whether he is competent to waive his 29.15 rights.

As discussed in Point II, Dr. Selbert, as one of Mr. Smith's treatment care providers at Potosi, was qualified to recommend that the motion court should order a forensic evaluation to determine whether Mr. Smith is competent to abandon his 29.15 rights. This Court should consider Dr. Selbert's recommendation that the motion court order an evaluation of Mr. Smith, along with all the other evidence that was presented to that court, and direct the motion court to order a mental evaluation of Mr. Smith. Alternatively, this Court should reverse and remand with directions that the motion court consider Dr. Selbert's recommendation that an evaluation is needed and reconsider its ruling denying an evaluation in light of Dr. Selbert's recommendation.

Respectfully submitted,

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Certificate of Compliance

I, William J. Swift, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 11,189 words, which does not exceed the 31,000 words allowed for an appellant's brief.

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William J. Swift

Certificate of Service

I, William J. Swift, hereby certify that two true and correct copies of the attached brief and floppy disk(s) containing a copy of this brief were hand delivered, on the 8th day of January 2003, to the Office of the Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, Missouri 65101.

William J. Swift

APPENDIX

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